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In The

Supreme Court of the United States

October Term, 1964

No. 843

MARIE B. NICK,

Petitioner,

vs.

STATE HIGHWAY COMMISSION OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin (App. A of Petition), is reported at 21 Wis. (2d) 489. The opinion of the Circuit Court for Dane County, Wisconsin, is unreported (App. B, infra., pp. 26-29). The Order of the State Highway Commission denying petitioner's application for a driveway is unreported and is printed in (App. C, infra, pp. 30-32). The opinion of the Supreme

Court of the State of Wisconsin being a companion case, is printed in (App. D, infra, pp. 33-41) and reported at 13 Wis. (2d) 511.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. May the federal law declare the right of access of owners abutting highways?
2. Did the right of access, which the petitioner alleges has been taken, exist?
3. Has the petitioner been deprived of her property without due process of law?

STATUTES INVOLVED

Wisconsin Statutes:

"84.25 Controlled-access highways. (1) AUTHORITY OF COMMISSION; PROCEDURE. The legislature declares that the effective control of traffic entering upon or leaving intensively traveled highways is necessary in the interest of public safety, convenience and the general welfare. The commission is authorized to designate as controlled-access highways the rural portions of the state trunk system on which, after traffic engineering surveys, investigations and studies, it shall find, determine and declare that the average traf-

fic potential is in excess of 2,000 vehicles per 24-hour day. Such designation of a portion of any state trunk highway in any county as a controlled-access highway shall not be effected until after a public hearing in the matter shall have been held in the county courthouse or other convenient public place within the county following notice by publication once each week for 3 successive weeks in a newspaper published in the county, or if there be none, in a newspaper having general circulation in the county. If the commission shall then find that the average traffic potential is as provided by this subsection, and that the designation of the highway as a controlled-access highway is necessary in the interest of public safety convenience and the general welfare, it shall make its finding, determination and declaration to that effect, specifying the character of the controls to be exercised. Copies of the finding, determination and declaration shall be recorded with the register of deeds, and filed with the county clerk, and published in the newspaper in which the notice of hearing was published, and the order shall be effective on such publication. Not more than 1,500 miles of highway shall be designated as controlled-access highways under authority of this section.

"(2) CONTROLLED-ACCESS HIGHWAY DEFINED. For the purposes of this section, a controlled-access highway is a highway on which the traffic is such that the highway commission has found, determined and declared it to be necessary, in the interest of the public safety, convenience and the general welfare to prohibit entrance upon and departure from the highway or street except at places specially designated and provided for such purposes, and to exercise special controls over traffic on such highway or street.

"(3) CONSTRUCTION; OTHER POWERS OF COMMISSION. In order to provide for the public safe-

ty, convenience and the general welfare, the commission may use an existing highway or provide new and additional facilities for a controlled-access highway and so design the same and its appurtenances, and so regulate, restrict or prohibit access to or departure from it as the commission may deem necessary or desirable. The commission may eliminate intersections at grade of controlled-access highways with existing highways or streets, by grade separation or service road, or by closing off such roads and streets at the right-of-way boundary line of such controlled-access highway and may divide and separate any controlled-access highway into separate roadways or lanes by raised curbings, dividing sections or other physical separations or by signs, markers, stripes or other suitable devices, and may execute any construction necessary in the development of a controlled-access highway including service roads or separation of grade structures.

"(4) CONNECTIONS BY OTHER HIGHWAYS. After the establishment of any controlled-access highway, no street or highway or private driveway, shall be opened into or connected with any controlled-access highway without the previous consent and approval of the commission in writing, which shall be given only if the public interest shall be served thereby and shall specify the terms and conditions on which such consent and approval is given.

"(5) USE OF HIGHWAY. No person shall have any right of entrance upon or departure from or travel across any controlled-access highway, or to or from abutting lands except at places designated and provided for such purposes, and on such terms and conditions as may be specified from time to time by the commission.

"(6) ABUTTING OWNERS. After the designation of a controlled-access highway, the owners or occu-

pants of abutting lands shall have no right or easement of access, by reason of the fact that their property abuts on the controlled-access highway or for other reason, except only the controlled right of access and of light, air or view.

"(7) SPECIAL CROSSING PERMITS. Whenever property held under one ownership is severed by a controlled-access highway, the commission may permit a crossing at a designated location, to be used solely for travel between the severed parcels, and such use shall cease if such parcels pass into separate ownership.

"(8) RIGHT OF WAY. Any lands or other private or public property or interest in such property needed to carry out the purposes of this section may be acquired by the highway commission in the manner provided in section 84.09.

"(9) CO-OPERATIVE AGREEMENTS. To facilitate the purposes of this section, the commission and the governing bodies of a city, county, town or village are authorized to enter into agreements with each other or with the federal government respecting the financing, planning, establishment, improvement, maintenance, use, regulation or vacation of controlled-access highways or other public ways in their respective jurisdictions.

"(10) LOCAL SERVICE ROADS. In connection with the development of any controlled-access highway, the commission and county, city, town or village highway authorities are authorized to plan, designate, establish, use, regulate, alter, improve, maintain, or vacate local service roads and streets or to designate as local service roads and streets any existing roads or streets, and to exercise jurisdiction over local service roads in the same manner as is authorized over controlled-access highways under the provisions of this

section, if, in their opinion, such local service roads or streets shall serve the necessary purposes.

"(11) COMMERCIAL ENTERPRISES. No commercial enterprise shall be authorized or conducted within or on property acquired for or designated as a controlled-access highway.

"(12) UNLAWFUL USE OF HIGHWAY; PENALTIES. It shall be unlawful for any person to drive any vehicle into or from a controlled-access highway except through an opening provided for that purpose. Any person who violates this provision shall be punished by a fine of not more than $100 or by imprisonment for not more than 30 days, or by both such fine and imprisonment.

"(13) VACATING. A controlled-access highway shall remain such until vacated by order of the state highway commission. The discontinuance of all state trunk highway routings over a highway established as a controlled-access highway shall summarily vacate the controlled-access status of such section of highway only after a traffic engineer survey investigation and study finds, determines and declares that the vacating of the controlled-access status is in the public interest. Such vacating shall not be effected until after a public hearing is held in the county court house or other convenient place within the county, following notice by publication as provided in sub. (4). The state highway commission shall record formal notice of any vacation of a controlled-access highway with the register of deeds of the county wherein such highway lies."

Administrative Procedure and Review

"227.15 Judicial review; orders reviewable. Administrative decisions, which directly affect the legal

rights, duties or privileges of any person, whether affirmative or negative in form, except the decisions of the department of taxation, the commissioner of banks and the commissioner of savings and loan associations, shall be subject to judicial review as provided in this chapter; but if specific statutory provisions require a petition for rehearing as a condition precedent, review shall be afforded only after such petition is filed and determined.

"227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in section 227.15 and directly affected thereby shall be entitled to judicial review thereof as provided in this chapter. Proceedings for review shall be instituted by serving a petition therefor personally or by registered mail upon the agency or one of its members or upon its secretary or clerk, and by filing such petition in the office of the clerk of the circuit court for Dane county (unless a different place of review is expressly provided by law), all within 30 days after the service of the decision of the agency upon all parties as provided in section 227.14 or in cases where a rehearing is requested within 30 days after service of the order finally disposing of the application for such rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The petition shall state the nature of the petitioner's interest, the fact showing that petitioner is aggrieved and directly affected by the decision, and the ground or grounds specified in section 227.20 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving the same as petitioner and the name of the agency whose

decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the board of tax appeals or of the banking review board, the consumer credit review board or the credit union review board, or of the savings and loan advisory committee, the department of taxation or the commissioner of banks or the commissioner of savings and loan associations, as the case may be, shall be the named respondent. Copies of the petition shall be served, personally or by registered mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made; and for the purpose of such service the agency upon request shall certify to the petitioner the names and addresses of all such parties as disclosed by its records, which certification shall be conclusive. The agency (except in the case of the board of tax appeals and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan advisory committee) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court, in its discretion, may permit other interested persons to intervene.

"(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance stating his position with reference to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney-general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after

such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as herein provided or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

"227.17 Stay of proceedings. The institution of the proceeding for review shall not stay enforcement of the agency decision; but the reviewing court may order a stay upon such terms as it deems proper, except as otherwise provided in sections 189.25 and 196.43.

"227.18 Record on review. Within 30 days after service of the petition for review upon the agency, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings in which the decision under review was made, including all pleadings, notices, testimony, exhibits, findings, decisions, orders and exceptions, therein; but by stipulation of all parties to the review proceedings the record may be shortened by eliminating any portion thereof. Any party, other than the agency, refusing to stipulate to limit the record may be taxed by the court for the additional costs. The record may be typewritten or printed. The exhibits may be typewritten, photostated or otherwise reproduced, or, upon motion of any party, or by order of the court the original exhibits shall accompany the record. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

"227.19 Additional evidence; trial; motion to dismiss; amending petition. (1) If before the date for trial, application is made to the circuit court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the

additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon such terms as the court may deem proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court the additional evidence together with any modified or new findings or decision.

"(2) Proceedings for review of administrative agency decisions as provided in this chapter may be brought on for trial or hearing at any time upon not less than 10 days' notice given after the expiration of the time for service of the notices provided in section 227.16 (2).

"(3) Within 20 days after the time specified in section 227.16 for filing notices of appearance in any proceeding for review, any respondent who has served such notice may move to dismiss the petition as filed upon the ground that such petition, upon its face, does not state facts sufficient to show that the petitioner named therein is aggrieved and directly affected by the decision sought to be reviewed. Upon the hearing of such motion the court may grant the petitioner leave to amend the petition if the amendment as proposed shall have been served upon all respondents prior to such hearing. If so amended the court may consider and pass upon the validity of the amended petition without further or other motion to dismiss the same by any respondent.

"227.20 Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged

irregularities in procedure before the agency, testimony thereon may be taken in the court. The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

"(a) Contrary to constitutional rights or privileges; or

"(b) In excess of the statutory authority or jurisdiction of the agency or affected by other error of law; or

"(c) Made or promulgated upon unlawful procedure; or

"(d) Unsupported by substantial evidence in view of the entire record as submitted; or

"(e) Arbitrary or capricious.

"(2) Upon such review due weight shall be accorded the experience, technical competence and specialized knowledged of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to him shall not be foreclosed or impaired by the fact that he has applied for or holds a license, permit or privilege under such act.

"227.21 Appeals. Any party, including the agency, may secure a review of the final judgment of the circuit court by appeal to the supreme court. Such appeal shall be taken in the manner provided by law for appeals from the circuit court in other civil cases, except that the time for appeal shall be limited to 30 days from the notice of entry of the judgment."

STATEMENT

In 1951, Edward A. Reinders owned 40 acres of land at the intersection of State Trunk Highway 30 and Calhoun Road. The property had approximately 1,320 feet of frontage on State Trunk Highway 30 and approximately the same on Calhoun Road. The owner's buildings fronted on Calhoun Road. There were no driveways to State Trunk Highway 30.

The State Highway Commission of Wisconsin, 1951, declared State Trunk Highway 30 to be a controlled-access highway, pursuant to section 84.25, Wis. Stats. (Wis. App. 130).

The Commission in its findings and declaration did not authorize any access from the Reinders' property to State Trunk Highway 30. Subsequently, the Reinders made several requests for driveways, but they were all denied.

After making these requests, Reinders, in 1955, sold George Nick and Marie B. Nick, his wife, a parcel of land abutting State Trunk Highway 30. The parcel of land fronted only on State Trunk Highway 30 and was 330 feet wide and 250 feet deep and was approximately 990 feet east of the intersection of Calhoun Road and State Trunk Highway 30.

In 1957, George Nick made a request for a driveway which was denied. On April 15, 1960, Marie B. Nick, the surviving joint tenant, made a similar request for a driveway, which was denied. Subsequent to this denial, Marie B. Nick filed a petition in inverse condemnation, pursuant to section 32.10, Wis. Stats., requesting an appraisal of her

damages as a result of the taking of her access rights. The circuit court for Waukesha county dismissed her petition, whereupon she appealed to the supreme court of the State of Wisconsin, which affirmed the holding of the circuit court for Waukesha county (App. D).

The supreme court held that there was no taking of a property right and that any diminution in value as a result of the access control, which merely made the access more circuitous, was an exercise of the police power and not a taking of property for which compensation must be made. The court further held that the Nicks' took title, subject to the existing control of access, exactly as a purchaser of real estate takes, subject to zoning. Reinders' had no right to be compensated for the restriction of access to Highway 30, and therefore, no right of compensation was created by fractional changes of ownership.

On rehearing, the supreme court held that the relief of judicial review of the administrative decision, provided by section 227.15, Wis. Stats., is the exclusive remedy of the petitioner (App. D).

Petitioner thereupon again applied for a driveway. In the application, petitioner requested that a driveway not be denied without a hearing. The Highway Commission denied the request for the driveway and the request for the hearing (App. C).

The petitioner appealed the administrative decision to the circuit court for Dane County, pursuant to section 227.15, Wis. Stats. The circuit court upheld the order of the State Highway Commission, holding that the petitioner's application for a driveway is an attempt to acquire a

new right and not to protect an existing property right (App. B). The petitioner thereupon appealed the decision of the circuit court for Dane County to the Supreme Court of the State of Wisconsin. The Supreme Court affirmed the judgment of the circuit court for Dane County (App. A).

The petitioner brought this writ asking that the decision be reviewed on the basis that the petitioner has been deprived of property without due process of law and that her property was taken for public use without just compensation.

ARGUMENT

I. The State courts have the authority to declare the access rights of an owner of land abutting on public highways

The court has previously ruled on the question of access in the case of *Sauer v. City of New York* (1907) 206 U. S. 536, 548,

> ". . . The same law which declares the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the state court. It has authority to declare that the abutting land-owner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decisions, and

each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various States to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was not property taken, we hold that no violation of the Fourteenth Amendment is shown."

The right of access in Wisconsin is governed by statute, as well as by court decisions. It changes with the type of highway that a property owner may abut. As an example, the right of access to a town road is different from that of a state trunk highway, and the right of access to the interstate is further limited by statute.

As pointed out by the court in the *Sauer* case, *supra*, an attempt to define a uniform rule would be difficult, because, even in the State of Wisconsin, the right varies with the type of highway.

II. The Right of Access claimed by the Petitioner did not exist

The extent of the access rights of a landowner abutting a highway are defined by State law. The Wisconsin supreme court has defined those rights and has held that the petitioner has no right of direct access to State Trunk Highway 30 (App. D). The restriction of direct access to

State Trunk Highway 30 by the police power, pursuant to section 84.25, Wis. Stats., is not a taking of property. Therefore, there is no taking of property without just compensation and no violation of the Fifth Amendment.

The Wisconsin supreme court handed down the case of *Stefan Auto Body v. State Highway Commission* (1963), 21 Wis. (2d) 363, on the same day as it handed down the decision in the case at bar. The court referred to its decision in the petitioner's original case before the court, and, in effect, affirmed its holding that the petitioner did not have the right of access which she alleges has been taken without just compensation.

The court, at page 371, said:

> "It is argued by the defendant that as long as the plaintiff has access to the interstate highway by a system of public roads his right of access is not impaired unreasonably. This argument proceeds on the theory the abutting property owner is merely entitled to some physical access to the public highway system. In this case that is true only to the extent to which the indirect access by the frontage road to the new or existing road is considered reasonable. However, the limited-right-of-way concept finds some basis in prior decisions of this court in what is called the circuity-of-travel doctrine. This idea was advanced in the early case of *Chicago & N. W. R. Co. v. Railroad Comm.* (1918), 167 Wis. 185, 167 N. W. 266. That case involved the vacating of several streets in a city to eliminate at-grade crossings and the substitution therefor of an overhead crossing. The circuity of travel was not held to be a compensable item of damages. In *Carazalla v. State* which involved a taking of land for the construction of a new highway across the plaintiff's land leaving

the old highway intact to which the plaintiff has access rights, we held no compensation should be paid because the abutter's access to the new highway was circuitous. In *Nick v. State Highway Comm.* (1961), 13 Wis. (2d) 511, 109 N. W. (2d) 71, which involved Highway 30 as a limited controlled-access highway, we said, page 514, relying on a zoning case, 'An impairment of the use of property by the exercise of police power, where the property itself is not taken by the state, does not entitle the owner of such property to a right to compensation,' and held the diminution of value of land because the access to the highway was made more circuitous was not compensable. The question of the reasonableness or the suitability of the access to Highway 30 by way of another public road abutting the property was not raised.

"In the concurring opinion it was stated, page 518, 'If by reason of providing a frontage road, or the existence of a previously existing connecting highway, there is reasonable access to the controlled-access highway, no taking requiring compensation should be held to have occurred.' The *Nick-Case* involved the police power under sec. 84.25, Stats., relating to a controlled-access highway; the instant case is concerned with sec. 84.29, relating to the national system of interstate highways. * * *"

III. Due Process of Law does not require a hearing in an attempt to acquire a new right

The statutes of the State of Wisconsin set up the procedure for declaring a highway a controlled-access highway (Sec. 84.25, Wis. Stats.) and also set up the procedure to review the administrative decision of the State Highway Commission (Sec. 227.15 to 227.21, Wis. Stats.). If the

procedures are properly followed by the State Highway Commission, and the property owners do not take advantage of the method to review the administrative decision of the Commission, the property owner cannot later claim that his property was taken without due process of law. The law has long recognized statutes of limitations, and due process of law does not require the continuing, dormant right to challenge the propriety of an administrative order.

Section 84.25 (4) and (5), Wis. Stats., provides there shall be no connections with a controlled-access highway without the approval of the Commission in writing and on such terms and conditions as may be specified from time to time by the Commission. The controlled-access order specifically provides as follows (Wis. App. 132):

> "(4) After the effective date of publication of this Finding, Determination and Declaration, no street or highway or private driveway or service crossing shall be opened into or connected with the controlled-access highway without the written consent and approval of the Commission, which shall be given if the public interest shall be served thereby, and shall specify the terms and conditions on which such consent and approval is given."

The Wisconsin court held that in 1961, when the State Highway Commission declared State Trunk Highway 30 to be a controlled-access highway, the Commission had a right to deny the Reinders' property access to State Trunk Highway 30 because of the alternate access by Calhoun Road. The subsequent conveyance to George and Marie

B. Nick does not change the status of this controlled-access order.

Section 84.25 (4), Wis. Stats., further provides that the Commission shall give additional access only if the public interest will be served thereby. The Wisconsin supreme court determined that this is a legislative question and does not require a hearing to make this determination in the absence of allegations of fraud or corruption on the part of the Highway Commission. Therefore, due process does not require a hearing and the Wisconsin statutes do not provide for a hearing.

SUMMARY

The petitioner does not have the property right she alleges. Her right of access to State Trunk Highway 30 has been restricted by a reasonable exercise of the police power. The petitioner has access to State Trunk Highway 30, although it is more circuitous. Therefore, there has been no taking of property without just compensation.

Due process does not require a hearing when there is no property right to be protected. The State Highway Commission followed all of the steps provided by statute in exercising its police power, and therefore the petitioner

was not deprived of any property without due process of law.

Respectfully submitted.

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